[redacted]

[redacted]

[redacted]

[redacted]

MOTION TO DISMISS APPEAL

NOTICE OF MOTION TO DISMISS APPEAL AND BRIEF OF THE APPELLANT IN SUPPORT OF MOTION TO DISMISS APPEAL

[redacted]

RICHARD H. FIELD,
Appellee in Person.

18958

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

BARBER ASPHALT PAVING COMPANY,
Appellant.

vs.

RICHARD H. FIELD,
Appellee.

File No. 18798.
Term No. 202.

MOTION TO DISMISS APPEAL.

Comes the appellee, Richard H. Field, in the above appeal, and moves the honorable court to dismiss the appeal of the Barber Asphalt Paving Company herein, because, he says, this court has no jurisdiction of the same, or to hear and determine the matters sought to be brought before the court by such appeal.

RICHARD H. FIELD,
Appellee in Person.

NOTICE OF MOTION TO DISMISS APPEAL.

To the Barber Asphalt Paving Company, Appellant:

You are hereby notified that Richard H. Field, Appellee in the above named appeal, will, on Monday, the 26th day of October, A. D., 1903, at the meeting of the Supreme Court of the United States on that day, or as soon thereafter as the same can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

RICHARD H. FIELD,
Appellee.

BRIEF OF THE ARGUMENT.

THE PARTIES.—In the case below the appellee, Richard H. Field, was the complainant, and the appellant, The Barber Asphalt Paving Company, was the defendant. As the complainant, Field, also has an appeal pending in this court (Term No. 201), the respective appeals may be more conveniently referred to as "complainant's appeal, and "defendant's appeal."

NATURE AND OBJECT OF THE SUIT.—On January 4th, 1900, complainant, Richard H. Field, as a resident of Missouri, filed a bill in equity in the United States Circuit Court at Kansas City, Missouri, against the defendant, The Barber Asphalt Paving Company, as a West Virginia private corporation, praying the court to cancel, as clouds on the title to complainant's lands, 17 special tax bills, aggregating, exclusive of interests and costs, the sum of $3,376.45, purporting to have been issued by the city of Westport, as a Missouri fourth-class city, to the defendant paving company for paving done by defendant on Main Street, Baltimore Avenue and Wyandotte Street, three public streets in said city of Westport. (See complainant's bill, printed Record, page 1.)

NOTE: THE FIGURES IN PARENTHESIS, AFTER EACH OF THE PARAGRAPHS HEREINAFTER SET FORTH, ARE THE PAGES OF THE PRINTED RECORD, PREPARED AND FILED IN THIS CASE BY THE CLERK OF THIS COURT.

ALLEGED GROUNDS OF ILLEGALITY OF THE SPECIAL TAX BILLS.—The grounds of illegality of the special tax bills aforesaid, alleged in complainant's bill, were, to state them generally, as follows:

1. That the provisions of the Missouri State legislative act of 1895, conferring power to pave streets at the cost of adjacent lands in cities of the fourth-class, under color of which the tax bills in question were issued, violate Section 1 of the 14th amendment to the constitution of the United States. (Fourth charge of bill, page 2.)

2. That the street pavements in question were unnecessary and were ordered and contracted for by the board of aldermen of Westport because of the lobbying of the agents of defendant and because of the undue and illegal influence of the agents of the defendant over the said board of aldermen. (Sixth charge of bill, pages 3 and 4.)

3. That the defendant had a monopoly of Trinidad Lake Asphalt, the asphalt ordered and required in the pavements in question, and that Trinidad Lake Asphalt was designated in each of the resolutions, ordinances and contracts for the work in question at the instigation of defendant and by arrangement and combination of the board of aldermen of Westport with the view to lessening competition in the importation, etc., of other good and useful brands of asphalt for street paving. (Ninth and tenth charges of bill, page 5.)

4. That the resolutions and ordinances of the board of aldermen for the work in question violate the commerce clause of section 1 of article 8 of the constitution of the United States. (Last clause in complainant's amendment to tenth charge of his bill, page 22.)

5. That the resolutions, ordinances and contracts, and the acts of the defendant and the city authorities of Westport, in securing to the defendant paving company the work in question, violated the anti-trust act of Congress of July 2d, 1890, "to protect trade and commerce against unlawful restraints and monopolies." (Amendment to tenth charge of the bill, page 22.)

OPINION OF THE TRIAL COURT.—The Honorable Smith McPherson, judge of the Federal District Court of Iowa, heard and decided this case at Kansas City. The opinion filed by him in the case shows that the court ruled adversely to the claims of complainant upon the federal questions aforesaid, raised in his bill, and that the only question decided in complainant's favor was as to the necessity for one of the three street pavements in question, to-wit: the pavement on Wyandotte Street. The opinion discloses that it was the view and decision of the trial judge that the pavement laid by the defendant paving company on Wyandotte Street was unnecessary because there was then a good and substantial macadam pavement upon the street, and it was on this ground alone that the special tax bills issued to defendant paving company for the Wyandotte pavement were held void. (Printed Record, page 516, and more particularly page 520.)

It is proper to look at this opinion of the trial court to determine the right to the respective appeals to this court.

Loeb vs. Trustees Columbia Township, 179 U. S., 472, 481.
Egan vs. Hart, 165 U. S., 188.
Robinson vs. Caldwell, 165 U. S., 360.
Murdock vs. Memphis, 20 Wall., 591.

JUDGMENT AND DECREE.—The court, in and by the judgment and decree in this case, adjudged the said special tax bills for the Main Street and Baltimore Avenue pavement valid and binding as liens upon complainant's lands therein described, and dismissed complainant's bill as to said special tax bills for the Main Street and Baltimore Avenue paving, done by the defendant, but in and by the judgment and decree aforesaid, by separate and independent adjudication and order, held and adjudged to be void the special tax bills aforesaid held by defendant for the Wyandotte Street paving aforesaid, done by the defendant, and also adjudged to be void all prior proceedings of the municipal authorities of Westport and the defendant, in and about the said Wyandotte Street pavement, to-wit: (1) Resolution No. 590 of the board of aldermen, declaring the Wyandotte Street pavement necessary, (2) the city ordinance, No. 1931, ordering the work, (3) the contract with the defendant for the Wyandotte Street pavement, (4) the ordinance, No. 2047, levying special tax and assessment for the Wyandotte Street pavement; and (5) the court canceled the said special tax bills for the Wyandotte Street pavement and granted to complainant all of the relief prayed for in his bill as to the said special tax bills for the Wyandotte Street pavement aforesaid done by defendant. (Pages 23 and 24.)

TERM OF COURT AND DATE OF DECREE.—This decree was entered on Friday, October 10th, 1902, at the regular April term of the said court. (Page 22.)

APPEALS.—At the ensuing term of the court, to-wit: at the November term, on the 18th day of December, 1902, complainant and defendant respectively filed

assignment of errors and petition for appeal to the Supreme Court of the United States, which appeals were allowed. (Page 35.)

COMPLAINANT'S ASSIGNMENT OF ERRORS.—The complainant's assignment of errors was, that the court had erred in each of the adverse rulings and decisions of the court aforesaid, including the adverse decision of the court on the 14th amendment and commerce clause of section 8 of article 1 of the constitution of the United States, and in its construction of the anti-trust act of Congress, and that the court had erred in adjudging and decreeing the special tax bills for the Main Street and Baltimore Avenue paving valid and binding liens upon complainant's lands therein described. and in dismissing complainant's bill as to said special tax bills for the Main Street and Baltimore Avenue paving done by the defendant, and upon this part of the judgment and decree as to the Main Street and Baltimore Avenue special tax bills only, were errors assigned by the complainant.

(See complainant's assignment of errors, pages 25 to 31.)

(See complainant's petition for appeal, page 31.)

DEFENDANT'S ASSIGNMENT OF ERRORS.—The defendant's appeal presents no question upon the constitution of the United States. The assignment of errors filed by the defendant, in substance, assigned only two errors of the court in the judgment and decree in question, as follows:

First. (No. "1," first to eighth inclusive.) That the court erred in holding that the Wyandotte Street pavement was unnecessary and that the proceedings therefor, to-wit: the resolution, or-

dinance and contract for the repavement of Wyandotte Street with asphalt, in the fall of 1897, were unnecessary and unreasonable, and that such proceedings and the special tax bills issued thereon to defendant for the Wyandotte Street pavement were unauthorized and void.

Second. (No. II.) That the judgment and decree against the defendant in so far as it adjudges and decrees that the said Circuit Court had jurisdiction of this suit, and that the amount in dispute is not less than $2,000.00 is erroneous.

And defendant's appeal is in terms limited to these questions.

(Defendant's assignment of errors, page 32.)

(Defendant's petition for appeal, page 35.)

(Order allowing the appeals, page 35.)

POINTS AND AUTHORITIES.

I.

The Supreme Court has no jurisdiction of the defendant's appeal upon the question of jurisdiction of the Circuit Court, raised in error numbered "II" in defendant's assignment of errors, for the following reasons:

1. Because such question of jurisdiction is not certified to the Supreme Court from the court below.

Colvin vs. Jacksonville, 157 U. S., 368.
Chappel vs. U. S., 160 U. S., 499, and cases cited.
Huntington vs. Laidley, 176 U. S., 668 and 676.
The Bayonne, 159 U. S., 687.
Ansbro vs. United States, Id., 695.

2. Because the question of jurisdiction of the lower court is not *the only question* involved in defendant's appeal. Both the question of jurisdiction and the question of the correctness of the adverse decision of the court on the merits of the controversy, as to the necessity of the pavement of Wyandotte Street, the validity of the resolution or ordinace and contract for the work and of the special tax bills therefor, are in the errors assigned and brought up by defendant's appeal to this court. Such appeal should have been

taken to the United States Circuit Court of Appeals, and having been erroneously taken to this court, should be dismissed.

Van Wagenen vs. Sewall, 160 U. S., 373.
Chappel vs. U. S., 160 U. S., 499.
Robinson vs. Caldwell, 165 U. S., 360 and 361.
Arkansas vs. Schlierholz, 179 U. S., 600 and 601.
Merritt vs. Bowdoin College, 169 U. S., 551.
Mexican Central Ry. Co. vs. Eckenan, 187 U. S., 429.

3. The terms of the court at Kansas City, as prescribed by act of Congress, are April and November terms.

26 U. S. Stat. 369, and 27 U. S. Stat. 20.

Defendant's appeal to this court, on the question of jurisdiction, was too late. The judgment was rendered October 10th, 1902. This was at the April term of the Circuit Court (Page 22). The defendant's appeal was taken and allowed December 18, 1902, at the November term of the court (page 35). The appeal to the court, on the question of jurisdiction, was, therefore, out of time and should therefore be dismissed.

Calvin vs. City of Jacksonville, 158 U. S., 456.
Merritt vs. Bowdoin College, 169 U. S., 556.
The Bayonne, 159 U. S., 687.

When the April term of the court ended, the term at which the decree in question was rendered, the right of the defendant to a direct appeal to the Supreme

Court of the United States on the question of jurisdiction also ended. The defendant's right of appeal after that, and on the date its appeal was taken, was only to the Circuit Court of Appeals.

(See in point *Reed vs. Stanley*, 97 Fed. Rep., 521.)

4. Defendant's appeal to this court cannot be sustained because of the questions raised by the complainant upon the constitution of the United States, as aforesaid, these questions were all decided in favor of the defendant. It is only the unsuccessful party on the issue as to the constitutionality of a State law, who has a direct appeal to the Supreme Court of the United States.

Loeb vs. Columbia Township, 179 U. S., 472.
New Orleans vs. Emsheimer, 181 U. S., 153.
Muse vs. Arlington Hotel Co., 168 U. S., 430.

5. "Cross appeals in equity must be prosecuted like other appeals."

Farrar vs. Churchill, 135 U. S., 609.

See also *Hilton vs. Dickinson*, 108 U. S., 165.

The S. S. Osbourne, 105 U. S., 447.

This was said and held as to the time and manner for taking appeals from Circuit Court judgments prescribed in other existing provisions of Congress. It would seem only a fair corollary to hold that the appellate jurisdiction of a cross appeal must be determined the same as if a sole appeal.

II.

THE APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS, AND MUST BE, AS PRESCRIBED BY ACT OF CONGRESS. DEFENDANT'S RIGHT OF APPEAL, AS PRESCRIBED BY ACT OF CONGRESS, WAS TO THE CIRCUIT COURT OF APPEALS. THE APPELLATE JURISDICTION OF THAT COURT WAS NOT CONTROLLED, NOR CHANGED TO THE SUPREME COURT OF THE UNITED STATES, BY THE COMPLAINANT'S RIGHT OF APPEAL, NOR BY HIS APPEAL, TO THIS COURT.

Defendant's appeal to this court amounts to an assertion that this court has a remnant of appellate jurisdiction, not specified by Congress. No other position is left to the defendant to take, as otherwise defendant's appeal must be dismissed upon the preceding points and authorities cited. Complainant submits, with entire confidence, that the right of appeal to this court is prescribed and limited by the provisions of Congress to the cases specified, and that no provision of Congress can be pointed out, which authorizes the defendant's appeal to this court.

The act of Congress of 1891 (the present judiciary act prescribing appellate jurisdiction), established, in each judicial circuit, a United States Circuit Court of Appeals, and also specified the entire appellate jurisdiction of the Supreme Court of the United States and of the said Circuit Courts of Appeals, respectively.

The only provisions of this act, which refer to the appellate jurisdiction conferred, are:

(1) The last clause of section 4, (2) all of section 5, and (3) the first clause of section 6. These provisions are as follows:

"Sec. 4. * * * *The review by appeal*, by writ of error, or otherwise, from the existing Circuit Courts *shall be had only* in the Supreme Court of the United States or in the Circuit Court of Appeal hereby established, *according to the provisions of this act* regulating the same.

Sec. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

(1) In any case in which the jurisdiction of the court is in issue; in such cases *the question of jurisdiction alone* shall be certified to the Supreme Court from the court below for decision.

(2) From final sentences and decrees in Prize causes.

(3) In cases of conviction of a capital or other infamous crime.

(4) In any case that involves the construction or application of the constitution of the United States.

(5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

(6) In any case in which the constitution or law of any State is claimed to be in controvention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute for review of such cases.

Sec. 6. That the Circuit Court of Appeals, established by this act, shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the District Courts and in the existing Circuit Courts *in all other cases other than those provided for in the preceding section of this act, unless otherwise provided by law.*" * * * 26 U. S. Stat., 827.

1. These congressional provisions gave to plaintiff and defendant, respectively, an independent right of appeal from the judgment in this case.

United States vs Jahn, 155 U. S., 109.
Northern Pacific R. vs. Glaspel, 49 Fed. Rep., 482.

2. There is no room for any inference that Congress intended to authorize or permit the Supreme Court to have or exercise any implied appellate jurisdiction or any further appellate jurisdiction from United States Circuit Courts, other than what is specified in the provisions above quoted. *Expressum facit cessare tacitum.*

National Bank vs. Peters, 144 U. S., 572-3.
Mississippi Mills vs. Cohn, 150 Id., 202-209.
Smith vs. McKay, 161 Id., 355-359.
Arkansas vs. Schlierholz, 179 U. S., 598.

The act of Congress of 1891 clearly intended to vest all appellate jurisdiction, from Circuit Courts of the United States, in the Circuit Court of Appeals, except such as was expressly vested in the Supreme Court.

First, it specified all of the appellate jurisdiction of the Supreme Court and then, by a residuary clause following, it provided, that all unspecified or remaining appellate jurisdiction from a Circuit Court should be in the Circuit Court of Appeals. This act left no remnant of appellate jurisdiction from Circuit Courts undistributed.

Lau Ow Bew vs. United States, 144 U. S., 47.
The Paquette Habana, 175 U. S., 685-6.

A right of defendant to appeal to this court because of complainant's appeal and right of appeal, cannot be inferred, in the face of such contrary provisions. The provisions of the act of Congress restrict the right of appeal from the Circuit Court to the Supreme Court to such instances as are specified in the act. By the very words of the act any right of appeal, not specified, is to the Circuit Court of Appeals, and not to the Supreme Court. Defendant's appeal is excluded thereby and should be dismissed.

3. It may be insisted, upon the following decisions, that complainant's appeal to the Supreme Court brought the whole case to this court for review, including the part of judgment adverse to the defendant:

Davis & Farnum Mfg. Co. vs. Los Angeles, 189 U. S., 207.
Scott vs. Donald, 165 U. S., 58.
Robinson vs. Caldwell, Id., 362.
Chappel vs. United States, 159 U. S., 698.
Horner vs. United States, 143 U. S., 570.

There is this difference between these cases and the case at bar. In these cases there was neither a cross appeal nor any right to one, because the entire judg-

ment was adverse to the appellant, or plaintiff in error, who brought the case to this court. The obvious reason why it is said and held in these decisions that the appeal or writ of error therein brought up the whole of the merits of the controversy, including the questions of a non-federal character, as well as those upon the federal constitution, upon which the appellate jurisdiction of this court was based, was because otherwise the appellant or plaintiff in error would have a right and be required to resort to a subsequent review of the questions of a non-federal character in the Circuit Court of Appeals.

Columbus Construction Co. vs. Crane Co., 174 U. S., 600.
Robinson vs. Caldwell, 165 U. S., 359.
Loeb vs. Columbia Township Trustees, 179 U. S., 478-9.
Cincinnati, Hamilton, etc., Ry. Co. vs. Thieband, 177 U. S., 615.

To hold that this court has any appellate jurisdiction or right of review of the judgment, in so far as it was adverse to the defendant, on complainant's appeal upon a different portion and subject matter of the judgment, would be contrary to the general scope of appeals. "An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of appellant," and no more of the case.

Buckingham vs. McLean, 13 How. (U. S.), 150.

See also *Kelsey vs. Western*, 2 N. Y., 500.
Williams vs. Palmer, 2 Baxt. (Tenn.), 488.
Walker vs. Pritchard, 121 Ills., 221.
Oliver vs. Wilhite, 201 Id., 552.
Northern Pacific Ry. Co., vs. Glaspel, 49 Fed. Rep., 482.
United States vs. Jaha, 155 U. S., 109.

Defendant's appeal is truly a mere expletive, if complainant's appeal reopened the controversy as to the validity of the special tax bills held void and canceled by the judgment and decree in the case.

The action of the defendant in taking an appeal from this portion of the judgment shows very conclusively the view of counsel for defendant to have been that complainant's appeal did not reopen the controversy as to the validity of the special tax bills for the Wyandotte Street pavement, held void and canceled by the judgment and decree in the case; else, why did the defendant file petition for appeal and assign errors in the lower court as to this portion of the judgment and decree?

There may be cases where this court has considered the counter-rights or counter-equities of an appellee in acting upon the particular subject matter of an appeal as a unit, and properly so. For instance, if, in a suit in equity involving an accounting of mutual demands, it appear on appeal of the complainant in the Appellate Court, that some item of the account of the complainant was erroneously discredited by the trial court, or that some item of the account of the defendant was erroneously allowed by the trial court, it would be proper, and within the jurisdiction and prerogative of the Appellate Court as a court of equity, while correcting such error, to also take into consideration and allow any counter-item or equity of the defendant to the subject matter involved in complainant's appeal, erroneously unallowed in the lower court to the defendant, and thus protect such counter equity or offset of the defendant, or in reversing and remanding the case direct the court below to do so, and this,

too, without any appeal in the case by the defendant. To this extent, and no farther, it is just and equitable that the case be considered reopened by the appeal on one side.

Gilfillan vs. McKee, 159 U. S., 316.

While there was an appeal of the defendant pending in this court in the case of the United States vs. Mosby, 133 U. S., 273, the mutual demands and rights therein involved were really only one subject matter, and the court in that case could have done what it did without an appeal on the part of the defendant because of the unity of the subject matter involved.

The same may be truly said of the Missouri decisions, *Ellis vs Harrison*, 104, Mo., 270, and *Douglass vs Kansas City*, 147 Mo., 428, because of the unity of the subject involved in those appeals. The intermediate decision upon the subject, *Reichenbach vs. The United Masonic Ben. Ass'n.*, 112 Mo., 22, recognizes the correctness of complainant's position, in a case where the subject matter of the judgment appealed from is separable, in the following words: "Findings upon distinct causes of action in the same proceeding are sometimes separable on appeal."

And see *Walker vs. Pritchard*, 121 Ills., 221.

This court may learn somewhat, if it wishes, how relevant and analagous the Supreme Court of Missouri regards the rulings of this court on its appellate jurisdiction by referring to its recent decision, not yet officially reported, (*State vs. Smith*, 75 S. W. Rep., on page 632) where it is said: "But the defendants invoke the rule of practise of the Supreme Court of the United States announced in *New Orleans Waterworks vs.*

Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936, and *Equitable Life Ins. Co. vs. Brown*, 23 Sup. Ct. 123, 47 L. Ed. —, that, when the constitutional question raised or necessarily involved has been explicitly decided in another case, it will not be regarded as properly in a subsequent case. *The practice in this court is exactly the reverse.*"

The question involved, in the case of *United States vs. Mosby supra*, (as also in the Missouri cases noted), was as to the amount involved, which is no longer a determining fact in appellate jurisdiction from federal circuit courts.

Formerly the appellate jurisdiction of this court was based upon the amount involved. "But," as since held and said by this court, "all this has been changed by the act of March 3, 1891, c 517, establishing the Circuit Court of Appeals, and creating a new and complete scheme of appellate jurisdiction, *depending upon the nature of the different cases, rather than upon the pecuniary amount involved.*"

The Paquette Habana, 175 U. S., 681.

3a. Having been unsuccessful in the trial court upon the issues of law raised on the provisions of the Constitution of the United States, complainant had an indefeasible right, under the act of Congress, to a direct appeal to the Supreme Court of the United States.

Eustiss vs. Bolles, 150 U. S., 361.
Scott vs. Donald, 165 Id., 58.
Loeb vs. Columbia Township, 179 Id., 472.
New Orleans vs. Emsheimer, 181 Id., 153.
Connolly vs. Union Sewer Pipe Co., 184 Id., 540.
Davis & Farnum Mfg. Co. vs. Los Angeles, 189 Id., 207.

Defendant could not, by taking its appeal to the Circuit Court of Appeals from the portion of the judgment and decree adverse to it and assigning errors thereon, have reopened the controversy and conferred upon the Circuit Court of Appeals the appellate jurisdiction of the subject matter in the decree adverse to the complainant. This proposition is essentially correct, for otherwise the act of Congress of 1891 did not, as construed, give an independent right of appeal to complainant and defendant.

United States vs. Jahn, 155 U. S., 109.
Northern Pacific Ry. vs. Glaspel, 49 Fed. Rep., 482.

It also follows absolutely, from the same rulings, that if defendant's appeal and right of appeal could not impair or change the appellate jurisdiction of this court of complainant's appeal, that the appellate jurisdiction of the Circuit Court of Appeals of defendant's independent right of appeal was not determined, impaired or changed by complainant's appeal. This corollary sustains complainant's motion to dismiss defendant's appeal.

4. As a farther illustration of the separableness and independence of the respective rights of appeal of complainant and defendant from the judgment and decree in this case, had the defendant perfected its appeal to the United States Circuit Court of Appeals, as authorized by the act of Congress, and had that court, on defendant's appeal, affirmed the portion of the judgment and decree adverse to the defendant, on general principles of law, such judgment of the Circuit Court of Appeals would be no bar or impairment of complain-

ant's right to subsequently appeal to the Supreme Court of the United States from the portion of the judgment and decree adverse to him.

Brennan vs. State Bank, 10 Col. App., 368.
Wickliffe vs. Buckman, 12 B. Munroe, 424.
Gates vs. Pennsylvania R. R., 154 Pa. St., 566.
State ex rel. Gunderson vs. King, 6 S. D., 297.
Kelsey vs. Western, 2 N. Y., 500.
Walker vs. Pritchard, 121 Ills., 221.
Oliver vs. Wilhite, 201 Ills., 552.

This court has repeatedly allowed even one plaintiff or one defendant a right of appeal, while it denied to other plaintiffs or other defendants a right of appeal in the same case because of the difference of the subject matter of the appeal and of a difference of the right of appeal of the parties respectively from a decree in equity; in other words, an appeal by a party entitled to appeal does not bring to the Supreme Court a different part of the decree, adverse to another party who is not entitled to appeal to this court. The subject matter of such appeal is to be regarded as independently, as if in another suit.

Fourth National Bank vs Stout, 113 U. S., 686.
Schewed vs. Smith, 106 U. S., 190.
Hawley vs. Fairbanks, 108 U. S., 549.
Stewart vs. Dunham, 115 U. S., 64-65.
Henderson vs. Wadsworth, 115 U. S., 264.
Ex Parte vs. Phoenix Ins. Co., 117 U. S., 367.
Wheeler vs. Cloyd, 134 U. S., 537.
McMurray vs. Moran, Id., 159-160.
Ogden City vs. Armstrong, 168 U. S., 224.

5. This court has also regarded a decree in equity,

where it was in part for the complainant and the remainder for the defendant, as so far severable, that the complainant could accept and appropriate the part of the decree favorable to him and afterward appeal from the remainder of the decree unfavorable to him.

Gilfallan vs. McKee, 159 U. S., 303-311.

See also *Worthington vs. Beeman*, (Ct. of App.) 91 Fed Rep., 232.

6. DIFFERENT PROCEEDINGS FOR EACH STREET PAVEMENT.—There can be no kind of doubt in point of fact or law, that there is a separate subject matter involved in the respective proceedings for the street pavements in question. There was a separate resolution of necessity for the work, a separate ordinance ordering the work and a separate contract for each of the three pavements in question, etc.

(1.) The resolution of the board of aldermen of Westport declaring the necessity of the Main Street pavement was No. 540, and adopted March 29, 1897, (page 121.)

(2.) The like resolution for the Baltimore Ave. pavement was No. 570 and adopted June 17, 1897, (page 147.)

(3.) The like resolution for the Wyandotte Street pavement was No. 590 and adopted July 15, 1897, (page 171.)

(1.) The ordinance of the board of aldermen and mayor of Westport, ordering the Main Street pavement, was No. 1803 and approved May 5, 1897, (page 122.)

(2.) The like ordinance for the Baltimore Avenue pavement was No. 1866 and approved July 16, 1897, (page 147.)

(3.) The like ordinance for the Wyandotte Street pavment was No. 1931 and approved September 3, 1897, (page 171.)

(1.) The contract for the Main Street pavement is dated May 17, 1897, (page 124.)

(2.) The contract for the Baltimore Avenue pavement is dated July 26, 1897, (page 149.)

(3.) The contract for the Wyandotte Street pavement is dated September 11, 1897, (page 173.)

(1.) The ordinance confirming the contract for the Main Street pavement was No. 1818, and approved May 19, 1897, (page 135.)

(2.) The ordinance confirming the contract for the Baltimore Avenue pavement was No. 1888 and approved August 4, 1897, (page 161.)

(3.) The ordinance confirming the contract for the Wyandotte Street pavement was No. 1949 and approved September 22, 1897, (page 183.)

(1.) The ordinance levying assessments against abutting lands for the Main Street pavement was No. 1976 and approved October 5, 1897, (page 140.)

(2.) The like ordinance for the Baltimore Avenue pavement was No. 2046 and approved November 18, 1897, (page 165.)

(3.) The like ordinance for the Wyandotte Street pavement was No. 2047 and approved November 18, 1897, (page 187.)

Finally, there was a separate series and issue of

the special tax bills for each of the pavements in question.

(See allegations of bill, page 3; admitted in answer, pages 8 and 9.)

Westport, was a city of the fourth class. (See allegations of bill, page 1; admitted in answer, page 8). A separate resolution, separate ordinance, separate contract, etc., for each of the pavements were required by the charter provisions governing such a city.

City to use vs. Eddy, 123 Mo., 558-9.

(While the decision cited was upon charter provisions governing cities of the third class, such provisions are identically the same provisions as will be seen in the charter of cities of the fourth class. (Missuori session laws 1895, page 84, Sec. 85; page 86, Sec. 95).

It is perfectly obvious that a separate suit could have been maintained in any court of equity for the cancellation of the special tax bills for any one of the street pavements in question, and that an adjudication of the validity or invalidity of the special tax bills for such one of the three street pavements in question would be no adjudication as to the validity or invalidity of the special tax bills for the other two pavements in questions, or either of them. In such case, when, as here, the questions are in one suit as to the three street pavements, the questions of law and fact as to each street pavement are to be determined as independently as if involved, each in a different suit.

Worthington vs. Beeman, 91 Fed. Rep., 232.
Manitoba Fish Co. vs. Booth, 109 Fed. Rep., 594.
See also decisions of this court cited ante page 21.

THE SUBJECT MATTER INVOLVED IN DEFENDANT'S APPEAL IS SEPARATED FROM THE SUBJECT MATTER OF COMPLAINANT'S APPEAL, IN THE JUDGMENT AND DECREE, AND IS SEPARATED BY THE APPEALS RESPECTIVELY.

The subject matter of the judgment and decree adverse to the defendant is not lumped nor mingled with the portion of such judgment and decree adverse to the complainant. It orders, adjudges and decrees the invalidity of the particular special tax bills for the Wyandotte Street pavement, also the invalidity of the resolution, ordinances and contract aforesaid for the Wyandotte Street pavement, and in full, insofar as the said judgment and decree was adverse to the defendant, is as follows:

"And the court doth find, order, adjudge and decree that neither the complainant nor his lots of land described in his bill in equity herein, as charged with the special tax bills, hereinbefore called tax certificates, for said Wyandotte Street pavement, towit, lots three (3) and four (4) in block forty-one (41), and lot one (1) in block forty-nine (49), and all other property and lands facing on said Wyandotte street between Thirty-Eighth Street and Thirty-Ninth Street, all in Hyde Park, in said late city of Westport, Missouri, is in any way liable or chargeable for the work done by the defendant company in said Wyandotte Street pavement aforesaid. That the said Wyandotte Street special tax bills and certificates aforesaid are void, and were void when issued to the defendant in payment for said Wyandotte Street pavement aforesaid, for the reason that the prior proceedings taken by the city authorities of the city of Westport, in the year 1897, upon which the work was done and said tax bills were issued, towit: The resolution No. 590 of the Board of Aldermen of said City of Westport declaring the work of paving

Wyandotte Street necessary to be done from the south line of Hunter Avenue to the north line of Westport Avenue, in said city, adopted July 15, 1897; also the ordinance No. 1931 of said city, entitled, "An ordinance to pave Wyandotte Street from the south line of Hunter Avenue to the north line of Westport Avenue," approved September 3, 1897; also the contract between said city of Wstport and the defendant for said street pavement made under and pursuant to said proceedings; also the ordinance No. 1949 of the said city confirming the contract for said street pavement; also ordinance No. 2047 of said city, levying special tax and assessments and ordering special tax bills for said Wyandotte Street pavement, and each of them are void and were void *ab initio*. It is further considered, adjudged and decreed by the court that the defendant and its agents are hereby perpetually enjoined and restrained from transferring the said Wyandotte Street special tax bills aforesaid, or any of them issued against the property of complainant aforesaid, for the Wyandotte Street pavement aforesaid, also from bringing or prosecuting any action upon any of said special tax bills aforesaid in any other court, and that the defendant within sixty days bring the special tax bills aforesaid into this court and here cancel and remove the same as claims and clouds against the real estate aforesaid." (Page 24.)

The petition for appeal and assignment of errors therewith filed by the defendant, and the order allowing the defendant the appeal is in terms limited to this portion of the judgment as the subject matter involved in defendant's appeal. (Pages 32-35.)

AB INCONVENIENTI, NOT AN ARGUMENT OF WEIGHT IN THIS CASE. Diverse appeals in this case would have worked no inconvenience. The

appeal of the defendant to the Circuit Court of Appeals, would, if asked and allowed, have been stayed there till complainant's appeal in the Supreme Court was disposed of.

United States vs. Jahn, 155 U. S., 109.
Northern Pacific Ry Co. vs. Glaspel, 49 Fed. Rep. 482.

In such diverse appeals, each appellant, by filing a *precipe* with the clerk of the trial court, could have confined the contents of the transcript to the portions of the record, material or necessary to the hearing of his appeal. This practice is not only permitted but urgently invited by both this court and the Circuit Court of Appeals.

Teller vs. United States, 111 Fed. Rep. 119.
Id. 168.
Cunningham vs. German Savings Bank, 103 Id., 932.
Hunt vs. Kile, 98 Id., 49-51.
Burnham vs. North Chicago St. Ry. Co., 87 Id., 168.
Meyer vs. Mansus & Libbet's Imp. Co., 85 Id. 874.
Gregory vs. Pike, 64 Id. 415.
Starke vs. Klein, 62 Id., 502.
Norhna & L. R. Corp. vs. Boston, etc., 51 Id. 929, 61 Id. 237-8.
Blanks vs. Klein, 49 Id. 1.
Railway Co. vs. Stewart, 95 U. S., 279.
Railway Co. vs. Schutte, 100 U. S., 644-647.
The "Adriatic" 103 U. S., 730.
Ball & Socket Fastener Co. vs. Kractzer, 150 U. S., 112.

And thus each appellant could have prevented the sending to the Appellate Court the several hundred pages of redundant and effete matter in the transcript filed in this case. But with defendant's appeal also to this court, complainant's right to thus restrict the transcript to the relevant parts of the record was not so clear. Defendant, by its appeal, had colorably an equal right to control the transcript. From the drag-net form of the designations of what should be printed, filed by defendant with the clerk here, it ought not to be difficult for the court to determine how impossible it was, with defendant's appeal to this court, for the complainant to limit the transcript in this case.

RULING ON MOTION NOW SUBMITTED SHOULD NOT BE DEFERRED—The complainant submits that the court should sustain his motion to dismiss the defendant's appeal and should not defer the decision thereof until the final hearing of the case for the following reasons:

1. The complainant is entitled thereto.

2. If there is any doubt in the mind of the court as to its having been previously decided, should not the question be settled and the ruling of the court thereon published at once for the guidance of litigants and inferior courts in subsequent cases?

3. If the motion be sustained before the submission of the case, the future work of the court and counsel in the case will be reduced probably at least forty per cent.

4. If the disposition of the motion be deferred till the hearing of the case, it will become necessary for counsel to ask additional time for argument in the case.

Respectfully submitted,

RICHARD H. FIELD,
Complainant, in person.